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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JON'S FISH MARKET et al.,	
Plaintiffs and Appellants,	G039385
v.	(Super. Ct. No. 06CC04739)
COUNTY OF ORANGE,	O P I N I O N
Defendant and Respondent.	

Appeal from a judgment of the Superior Court of Orange County, Steven L. Perk, Judge. Affirmed.

Van Loon & Associates and Paul L. Van Loon for Plaintiffs and Appellants.

Benjamin P. deMayo, County Counsel, and James C. Harman, Deputy County Counsel for Defendant and Respondent.

This case arises from a dispute regarding the property tax assessment of several merchants (the Taxpayers)[1] conducting business in the Dana Point Harbor and Marina (the Harbor), which is owned by the County of Orange (the County). The Taxpayers challenged the 2002, 2003, and 2004 tax assessments made by the Orange County Assessor (the Assessor) first to the Assessment Appeals Board (AAB) and then to the superior court. Throughout the proceedings below, the parties agreed the Assessor had the discretion to value each of the Taxpayer's possessory interests based upon the capitalization of income approach, but they disagreed on the proper way to determine the income stream to be utilized under this approach. Specifically, the Taxpayers believed the Assessor's decision to use rent payments as evidence of the income stream was wrong because their rents were based on a percentage of their gross income, necessarily including non-taxable factors such as enterprise value and fees for the maintenance of common areas not actually "possessed" by the Taxpayers.

This challenge would ordinarily be a question of law to be reviewed de novo by the trial court and by this court. (See *Service America Corp. v. County of San Diego* (1993) 15 Cal.App.4th 1232, 1235 (*Service America*).) However, the Taxpayers invited error in this case by repeatedly advising the trial court to apply the substantial evidence rule, which it did. Under the doctrine of invited error, they are now bound to this standard on appeal. We affirm the judgment.

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[1] The Taxpayers are Aloha Restaurant, Inc., B&G Classic Corp., Beach Cities Pizza, Inc., Catalina Channel Express, Inc., Dana Point Harbor Grill, Inc., Demike, Inc., Downstairs Store, Inc., Mary Jane Eadson, Detra Francis, Gemmell's Restaurant, Marty O'Day, Inc., Jennifer Rentziperis Leech, Miller and Miller, George Psilopoulos and Diana Psilopoulos, San Clemente Sportsfishing, Inc., Marla Sharman, Nevine Sidhorn, Turk's, Inc., Upstairs Store, Inc., Whimsey Hollow, Inc., Wind & Sea Restaurants, Inc., Zakai, Inc.

FACTS

A. The County's Assessments and Lease Agreements

The County owns the land, waterways, and improvements at the Harbor. In 1971, the County entered into a 30-year lease with Vintage Marina Partners, which built restaurants and retail stores in the Harbor. It also built common areas, such as walkways, esplanades, and parking lots. Each year, the Assessor sent a single property tax bill (using an income approach) that was paid by Vintage Marina Partners, the master lessee. The merchants paid the master lessee rent based on the percentage of gross sales. Each month they also paid common area maintenance (CAM) charges, which included the common area maintenance fees as well as a portion of the property taxes. In 2000, the last year before the master lease expired, the property tax bill paid by Vintage Marina Partners was $5,580,700.

The County did not renew the master lease, but rather negotiated new lease agreements with each of the 43 businesses located in the Harbor. The terms of these leases are substantively identical except for paragraphs 2, 5, 7, and 9, which relate to descriptions of the premises, use, term, and rent provisions. Each lease conveys a possessory interest only in the "footprint" on which the respective businesses are located. The County retained "the sole and exclusive control of business activities within the [c]ommon [a]reas, as well as the right to make changes to the [c]ommon [a]reas."

The County negotiated rents based on the greater of a minimum rent sum or percentage of gross sales (approximately 9 to 10 percent), not on a price per square foot. The percentage depended on the type of merchant. Retail stores generally paid 6 percent, and restaurants paid up to 10 percent of gross receipts. For example, Gemmell's Restaurant agreed to pay a minimum annual rent of $36,000 or 9 percent of its gross receipts from its business operations, whichever was greater. A second component of the rent was a CAM charge. All merchants paid the greater of $500, or 1 percent of gross income, whichever was greater for CAM fees.

The Assessor did not become aware of the County's new leases until 2004. It then appraised each Taxpayer's possessory interests and issued a tax bill for the years 2002, 2003, and 2004. The Assessor claimed to have used the "direct income approach" of valuation and calculated the tax by "using the actual contract rents collected and the actual declining terms of the leases. [It] subtracted 15 percent expenses from the rents collected and used a 10 percent discount rate to calculate the present worth value." Using this approach, the Assessor valued the entire property at $43,466,288.

B. Claim for refund to the AAB

The Taxpayers are 22 of the Harbor's merchants, representing 25 properties, who filed applications with the County for changed assessments for the years 2002, 2003, and 2004. The AAB consolidated the applications and held a hearing. The Taxpayers argued the Assessor's application of the income capitalization approach was in essence another form of income tax. It showed gross disparities in taxation of like properties being used for similar purposes in the Harbor.

For example, the Taxpayers' counsel stated the problem was highlighted by the comparison of three similarly situated restaurants in the Harbor, all paying rent based on 9 percent of gross receipts (because it exceeded the minimum annual amount). The Harbor Grill Restaurant paid $282,149 in rent in 2002. After factoring in the term of the lease and the two discounts, the Assessor calculated a possessory interest value of $2,041,700 for tax purposes. Although the formula utilized did not take into account square footage, for the sake of comparing merchants this valuation equated to a tax assessment of $854 per square foot. Approximately 15 feet away from the Harbor Grill is the Zagat's three star rated Gemmell's Restaurant. The two structures were built on the same date, the leases were created on the same day, and both establishments utilized approximately the same amount of space. However, Gemmell's Restaurant's gross receipts are substantially less, and it therefore pays less annual rent to the County. Gemmell's Restaurant's assessed taxes were five times less than Harbor Grill's taxes

($854 versus $147 per square foot). And finally, sharing a common wall with Gemmell's Restaurant is Beach City Pizza, which has a footprint approximately the same size as the others, but was assessed taxes for its possessory interest at the equivalent rate of $346 per square foot. The Taxpayers' counsel posed the telling question: What if Gemmell's Restaurant and Beach City Pizza were to swap locations, would the value of their possessory interests drastically increase or decrease respectively?

The Taxpayers maintain these obviously inequitable assessments occurred because the Assessor unfairly included "enterprise values" of the business (trade names, logos, advertising, operations, customer goodwill) rather than just the real property on which the business was located. Moreover, they contested the Assessor's failure to subtract the CAM charges, which were a component of the rents, and related to the Harbor's common areas over which the Taxpayers had no possessory interest or control. The Taxpayers argued the direct cost approach should have been used, and it presented evidence and argument supporting the values calculated under that alternative approach. The AAB disagreed: It "sustain[ed] the Assessor's evaluation of the properties."

Claims made in Superior Court

The Taxpayers each filed a separate complaint in superior court seeking refunds of property taxes. Each also filed a motion for peremptory writ of mandamus, a petition for writ of administrative mandamus, and a memorandum of points and authorities in support of the motion for a writ of mandamus. Later, the parties stipulated to withdraw the various writs to "eliminate any confusion or controversy over what operative pleading the court will consider for ruling or judgment . . . ." In the stipulation, the parties noted the "facts alleged and relief requested" in the writs were similar to the "allegations and prayers for relief" in the complaints. They stipulated the memorandum of points and authorities in support of the motion for writ of mandate would be treated as an opening brief. The County filed a responsive brief. Before the trial, the complaints were consolidated.

At the trial, the first question the trial court asked the parties was whether the Taxpayers were contesting the choice of the appraisal method (the income capitalization approach) or the "formula or the method with which [the Assessor] appli[ed] the approach[.]" The court indicated it was confused as to the applicable standard of review. Although the writs had been withdrawn, the court asked, "What is it you're asking the court to do in *this writ*?" (Italics added.)

The Taxpayers replied they were not contesting the fact the Assessor used the income capitalization approach, but disputed the formula/method with which the Assessor applied the approach. The court inquired if this issue was "going to require it to go through and factually analyze what happened at the appeals board hearing?" The Taxpayer's trial counsel replied, "Yes." The Taxpayers did not present any new testimony or evidence at trial.

On the second day of the trial, the court asked again "what is the standard that applies?" The court restated it was confused, telling counsel, "When you originally came in, you were contesting the methodology, the particular formula that was used. You've backed off on that now, and you are now contesting the calculations. Am I right on that or wrong?" The Taxpayers' counsel stated the methodology issue would include questions about the calculations. He conceded, "the Assessor has the discretion to determine which approach they are going to use. [¶] While we agree that the direct cost approach is the best approach, we understand that they have the discretion to determine whichever approach they want." He summarized the Taxpayers were contesting the inclusion of the CAM charges for common areas, and the failure to subtract the business enterprise values from the income stream used for the income capitalization approach. Again, counsel conceded the standard of review was substantial evidence.

After considering additional argument, the court concluded, "Applying the substantial evidence test, which both parties agree that is the test, it appears to me that the assessor has applied the formula, and there is substantial evidence to support the finding

and assessment by the Assessor, and the writ is denied." The County's attorney asked if the complaints were "denied as well," and the court replied, "Yes." The trial court entered judgment in favor of the County.

DISCUSSION

A. Preliminary Considerations

"We first review preliminary considerations which are not in dispute or are at least we think well settled, but which require our brief recitation before approaching the central issue of this case. [¶] Property subject to taxation is assessed at its 'full value.' (Rev. & Tax. Code, § 401.) Property owned by governmental entities is generally exempt from taxation. [Citation.] Where the governmental property is leased to or otherwise devoted to use by a private entity, however, the private interest so created is subject to tax, and is separately assessed as a 'possessory interest.' [Citation.] . . . Considerable controversy has been generated over recent years as to the exact nature of the interest which will permit classification as a taxable possessory interest [citation]. There is no dispute in this case, however, as to the existence of a possessory interest held by [the Taxpayers]." (*Service America, supra,* 15 Cal.App.4th at pp. 1234-1235.) The Taxpayers' lease agreements gave them the right to occupy and use space in the Harbor, and the parties agree this property interest is subject to valuation and taxation by the County.

We recognize the record is unclear as to whether the trial court treated the proceeding as a trial on the complaint, or a request for a writ. Although the parties do not discuss or dispute this issue, we think it is important to clearly define the type of ruling we are being asked to review. "We note that the mechanism for judicial review of decisions by a county assessment appeals board is significantly different from that of other administrative agency decisions. Ordinarily the aggrieved taxpayer's remedy is not to seek administrative mandate pursuant to Code of Civil Procedure section 1094.5, but to pay the tax and file suit in superior court for a refund. (*County of Sacramento [v.*

Assessment Appeals Bd. No. 2 (1973) 32 Cal.App.3d 654,] . . . 672 [(*County of Sacramento*)] . . . Cal. Administrative Mandamus (Cont. Ed. Bar 1989) § 3.16, p. 86.)" (*Sunrise Retirement Villa v. Dear* (1997) 58 Cal.App.4th 948, 955, fn. 2 (*Sunrise*).)[2]

Here, although this action started as request for administrative mandamus under Code of Civil Procedure section 1094.5, and apparently the court treated it as a writ proceeding during the trial, the correct avenue for judicial review of the assessment was through a complaint for a refund under Revenue and Taxation Code section 5140 et seq. Fortunately, the record shows the complaints were the operative pleadings before the trial court (according to a pretrial stipulation) and in the end, the court stated the relief requested by the complaints was denied. Accordingly, we will review the judgment entered in favor of the County in the Taxpayers' complaint for a refund.

B. Standard of Review

"As was well-stated by the court in *Shell Western E & P, Inc. v. County of Lake* (1990) 224 Cal.App.3d 974 . . .: 'The California Constitution specifies that "[t]he county board of supervisors, or . . . assessment appeals boards created by the county board of supervisors, shall constitute the county board of equalization" with the duty to "equalize the values of all property on the local assessment roll by adjusting individual assessments." (Cal. Const., art. XIII, § 16.) Accordingly, "while sitting as a board of equalization, the county board of supervisors is a constitutional agency exercising quasi-judicial powers delegated to the agency by the Constitution" [citation] with "special expertise in property valuation." [Citation.] In light of the semijudicial status of

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[2] "If the administrative agency is empowered to decide the factual issue in the first instance and it erroneously fails or refuses to do so, either administrative or traditional mandate is available to compel the agency to hold a hearing. (See Cal. Civil Writs Practice [(Cont. Ed. Bar 1997)], § 6.5, p. 197; *County of Sacramento*, [*supra*,] 32 Cal.App.3d [at p.] 673 . . . .) In such cases, the proper remedy is to order the agency to perform its statutorily mandated duty—but the court may not step into the shoes of the agency and perform its function for it, since mandate does not lie to control the discretion conferred in a public agency. [Citation.]" (*Sunrise, supra,* 58 Cal.App.4th at p. 955.)

local boards, "their factual determinations are entitled on appeal to the same deference due a judicial decision, i.e., review under the substantial evidence standard." [Citation.] . . . [¶] On the other hand, courts are authorized to conduct an independent reassessment "when a board of equalization purports to decide a question of law." [Citations.] A board's "arbitrariness, abuse of discretion, or failure to follow the standards prescribed by the Legislature" are legal matters subject to judicial correction. [Citations.] Finally, interpretation of statutes and administrative regulations are quintessential issues of law. [Citation.]' [Citation.]" (*Mission Housing Development Co. v. City and County of San Francisco* (1977) 59 Cal.App.4th 55, 72 -73 (*Mission*).)

"In addition, '[w]here a taxpayer challenges the validity of the valuation method used by an assessor, the trial court must determine as a matter of law "whether the challenged method of valuation is arbitrary, in excess of discretion, or in violation of the standards prescribed by law." [Citation.] Our review of such a question is de novo. [Citation.] By contrast, where the taxpayer challenges the application of a valid valuation method, the trial court must review the record presented to the Board to determine whether the Board's findings are supported by substantial evidence but may not independently weigh the evidence. [Citations.] This court, too, reviews a challenge to application of a valuation method under the substantial evidence rule. [Citation.]' [Citation.]" (*Mission, supra*, 59 Cal.App.4th at p. 73.)

However, the determination of whether the taxpayer is challenging the "validity of the valuation method" or the "application of a valid valuation method" is difficult, especially when the body of case law on this subject tends to interchangeably use the terms method, application, formula, methodology, and calculation. We found it helpful to review the process the assessor generally employs in arriving at an assessed value.

The first determination the assessor makes is the selection of one of three basic approaches for determining full cash value of the possessory interest: (1) the

income capitalization approach; (2) the comparative sales approach; or (3) the reproduction and replacement cost approach. This determination by the assessor is presumed to be correct and a taxpayer challenging the assessor's approach selection bears the burden of rebutting this presumption. (*Mission, supra,* 59 Cal.App.4th at pp. 83-84; Cal. Code Regs., tit. 18, § 321, subd. (a).) The assessor's next determination is the method by which the approach will be pursued. The method could be characterized as the formula. The assessor's method/formula designation is reviewed de novo because the trial court must determine as a matter of law "'whether the challenged method of valuation is arbitrary, in excess of discretion, or in violation of the standards prescribed by law.'" (*Mission, supra,* 59 Cal.App.4th at p. 73.) The last determination made by the assessor is the selection of data to be used in the formula. When there is conflicting evidence as to the data, the court reviews this challenge under the substantial evidence standard. (*Ibid.*)

With this in mind we turn to the *Freeport-McMoran Resource Partners v. County of Lake* (1993) 12 Cal.App.4th 634 (*Freeport-McMoran*) case. In *Freeport-McMoran,* appellant was the owner of geothermal power plants and entered into a long-term contract providing a fixed price for energy from Southern California Edison. The contract price was above the market price. "The parties agreed that the capitalized income approach was the proper one to use in determining the value of geothermal properties[,] but disagreed as to the proper method for determining the income stream to be utilized under this approach." (*Id.* at p. 639.) Having agreed the income approach was proper, appellant claimed the county overvalued the property by basing its assessment on the income stream from the contracts rather than on the market rates. (*Id.* at pp. 638-639.) Appellant argued its contract with Edison was an intangible asset that could not be treated as taxable property. (*Id.* at p. 643.)

As in the case before us, the parties disputed the standard of review: "Appellant views this as a case for de novo review, characterizing the issue as whether

the valuation method used by the county and Board was proper; the county views the disputed issue of which income stream to utilize as a question of 'application' of the income method of valuation." (*Freeport-McMoran, supra*, 12 Cal.App.4th at p. 640.) With respect to the standard of review, the court noted, "The determination whether a challenge is to 'method' or 'application' is not always easy." (*Ibid.*)

In deciding de novo review applied, the *Freeport-McMoran* court explained, "In *Union Pacific Railroad Co. v. State Bd. of Equalization* [(1991)] 231 Cal.App.3d 983, 989, railroad operating assets had been assessed by means of the '"income" or "capitalized earnings ability" approach.' The parties agreed this was the best general approach for valuing the assets in question[,] but disputed issues regarding the size of the income stream—whether certain costs should be deducted as expenses and whether the income stream should be projected as a perpetuity or a limited lifetime. [Citation.] With respect to the standard of review, the court stated: 'A valuation method may be recognized as theoretically coherent and logical, yet be so inappropriate to the type of property being assessed as to ensure, for all properties of that general kind, that the results reached will not approximate fair market value. A claim of this kind could be termed a challenge to the "application" of the method, presenting a factual question. But where the claim is that, due to the basic undisputed characteristics shared by an entire class of properties, the challenged method will produce systematic errors if applied to properties in that class, the issue is not factual but legal. The issue is not whether the assessor misunderstood or distorted the available data, but whether he or she chose an appraisal method which by its nature was incapable of correctly estimating market value.' [Citations.] [¶] Similarly, here, the parties dispute which of two possible methods of determining the income stream to be used in an assessment under the income approach to valuation is the more appropriate given the nature of the properties and industry in question. There are no disputed issues of fact; the parties agree even on the amount of

the valuation under either approach. The question presented is one of law and we review the court's decision de novo." (*Freeport-McMoran, supra,* 12 Cal.App.4th at pp. 640-641.)

Likewise, in the case before us, the Taxpayers and the County agreed the Assessor's first determination to use a capitalized income approach was generally reliable for determining the value of their leased possessory interests, but the Taxpayers disagreed as to the Assessor's method for determining the income stream to be utilized under this approach. There was no claim the Assessor misunderstood or distorted the data. There are no disputed facts as to the Taxpayers' earnings, the space occupied, the nature of their businesses, or the terms of their lease agreements. (See *Freeport-McMoran, supra,* 12 Cal.App.4th at p. 641; *Service America, supra,* 15 Cal.App.4th at p. 1235 [de novo review when appellant claimed enterprise value of business was erroneous included in income stream used for income capitalization approach].) The Taxpayers are correct in stating, "Because the sole issue on appeal is whether the Assessor's methodology is legally flawed, the standard of review is de novo." However, this victory does not carry the day for the Taxpayers.

Although we have rejected the County's argument the Taxpayers' "challenge to the application of a lawful appraisal method is reviewed on a substantial evidence basis," we must address the County's contention the Taxpayers are precluded from arguing on appeal the proper standard is de novo review.

C. Invited Error

At the trial, the court repeatedly asked the Taxpayers to articulate the basis of their dispute, and the appropriate standard of review. Both counsel assured the court its review was under the substantial evidence rule. When the court made its ruling on the record, the court stated it was applying the *agreed upon* substantial evidence standard, and there was no objection raised by the Taxpayers.

On appeal, the Taxpayers argue the written pleadings and trial brief below correctly asserted the trial court's standard of review was de novo, but trial counsel simply misspoke when he said the applicable standard was "substantial evidence." They argue even an "erroneous concession" should have no impact on this appeal because we must apply sound legal principles and "a reviewing court is never bound by concessions of counsel as to the law[.]" (*Escobedo v. Travelers Ins. Co.* (1961) 197 Cal.App.2d 118, 127.) We have reviewed the record, and it shows the Taxpayers' counsel "misspoke" not just once, but had several opportunities to advise the trial court on the appropriate standard of review.

For example, on the first day of trial, the court indicated it was confused as to the applicable standard of review, and asked the Taxpayers to explain whether they were contesting the choice of the appraisal method (the income capitalization approach) or the "formula or the method with which [the Assessor] appli[ed] the approach[.]" The Taxpayers replied they were not contesting the fact the assessor used the income capitalization approach, but disputed the formula/method with which the assessor applied the approach. The court inquired if this issue was going to require him "to go through and factually analyze what happened at the appeals board hearing?" The Taxpayers' trial counsel replied, "Yes."

On the second day of the trial, the court again asked what was its standard or review. The court indicated it was confused, stating, "When you originally came in, you were contesting the methodology, the particular formula that was used. You've backed off that now, and you are now contesting the calculations. Am I right on that or wrong?" The Taxpayers' counsel conceded "the assessor has the discretion to determine which approach they are going to use. [¶] While we agree that the direct cost approach is the best approach, we understand that they have the discretion to determine whichever approach they want. [¶] So I don't know if it's a question of – well, I guess we would be conceding that then." The court clarified, "Okay. Which means that you are contesting

the calculations that – the method that they used in applying the approach[?]" Counsel replied, "Yes." The court asked, "Which means the standard of review is substantial evidence?" Again counsel responded, "Yes."

"The 'doctrine of invited error' is an 'application of the estoppel principle': 'Where a party by his conduct induces the commission of error, he is estopped from asserting it as a ground for reversal' on appeal. [Citations.] At bottom, the doctrine rests on the purpose of the principle, which prevents a party from misleading the trial court and then profiting therefrom in the appellate court. [Citations.]" (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 403.) "Under the doctrine of invited error, when a party by its own conduct induces the commission of error, it may not claim on appeal that the judgment should be reversed because of that error. [Citations.]" (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 212.)

As discussed above, it is not always easy to determine whether a challenge is being made to a valuation method or application. Although the evidence presented may be of some assistance to the court in determining the focus of the dispute, it is incumbent on the parties to clearly present the question to the court. Here, the Taxpayers spoke in very general terms about the shortcomings they perceived in the County's appraisal process, but never articulated with specificity what they were asking the court to decide. The Taxpayers' implicit and explicit agreement that the correct standard of review was the use of the substantial evidence test suggested their challenge was an application or data question as opposed to a challenge to the method/formula.

We again reference the difficulties in parsing out the nature of an assessment challenge. The Taxpayers may challenge various aspects of the assessment process. The standard of proof varies depending on the particular aspects of the Taxpayers' complaint. It is not the trial court's responsibility to decide what question the parties are presenting. That responsibility falls squarely on the shoulders of the parties.

We find counsel's "erroneous concession" on the standard of review differs from a concession about a general legal principle relating to a cause of action. The concession here misled the trial court and caused it to apply the wrong standard of review, and the Taxpayers cannot benefit from this error on appeal. We conclude any judicial error in applying the substantial evidence standard of review is deemed invited error and cannot be the basis for a reversal.

Alternatively, the Taxpayers argue the same result occurs under either the substantial evidence test or de novo review. They offer the following twisted logic: The substantial evidence test applies only to findings of fact, and because the operative facts are undisputed, the only issue is whether the Assessor's use of those facts was permissible under the law. The Taxpayers conclude that under this "rubric," the court's "judgment is not supported by substantial evidence because the tax violates the substantive law of property taxation. If analyzed under a de novo review standard, the same ultimate question of law is presented. Thus, as applied here, there is nothing other than a semantic distinction between 'substantial evidence' and 'de novo' review. The ultimate question is the same and it is a legal question." Not surprisingly, the Taxpayers have no authority to support their theory the two standards should be treated alike (especially in a case involving invited error as to the standard of review). We will proceed under the well established rules of appellate law. Our review is limited to whether substantial evidence supports the judgment, and we will not decide questions of law not properly brought before the trial court in the first instance. As found by the trial court, we conclude the Assessor's valuation was supported by substantial uncontested evidence.

III

The judgment is affirmed. The County shall recover its costs on appeal.

O'LEARY, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.